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Independence of judges and lawyers

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, submitted in accordance with Human Rights Council resolution 17/2.

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Interim report of the Special Rapporteur on the independence of judges and lawyers

Summary

The present report, submitted in accordance with Human Rights Council resolution 17/2, addresses the need to consider and integrate a gender perspective in the criminal justice system as a fundamental step towards allowing equal access to justice for women and men and in respect of the role to be played by judges and lawyers.

While the meaning, scope and impact of gender encompasses more than women's rights, this report focuses on the interlinkages of the independence and impartiality of judges, prosecutors and lawyers and the criminal justice system when dealing with women as victims, witnesses and offenders. The Special Rapporteur underlines the negative impacts of gender stereotypes and the importance of integrating a strong gender perspective in all aspects of the criminal justice system and its procedures. The historical and pervasive discriminatory position of women throughout the world compelled the Special Rapporteur to look at their specific treatment in the criminal justice system. Nevertheless, as the integration of a gender perspective means integrating both women and men's perspectives and needs, more should be done to properly understand and challenge all the impacts and effects that gender-based stereotypes, prejudices and discrimination have on both women and men in both their access to and engagement in the justice system as a whole and the criminal justice system in particular.

Applying a human rights-based approach is the best instrument with which to guide States and other international and national actors alike, and allow the development of laws, rules of procedures and jurisprudence that respect internationally, as well as nationally, recognized legal principles of equality between women and men and non-discrimination on the grounds of gender. The Special Rapporteur highlights the fact that development of training and continuing legal education programmes, particularly in international human rights law, is the cornerstone for developing the capacity of the judiciary to challenge gender stereotypes within and outside the criminal judicial system and provide the basis for more equal application of criminal legislation, and therefore for a more equal access to justice for women.

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I. Introduction

1. The present report is the second one submitted to the General Assembly by the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, since her appointment in June 2009. Her mandate was established in Commission on Human Rights resolution 1994/41 and renewed, most recently, in Human Rights Council resolution 17/2.

2. The Special Rapporteur and her predecessors have asserted that the independence of judges and lawyers lies at the core of the respect for the rule of law, the fight against impunity and the well-functioning of a democratic system. The independence of judges and lawyers is also essential for the protection and enforcement of human rights and for ensuring that there is no discrimination in the administration of justice.

3. The Special Rapporteur has chosen to analyse the topic of gender and its relevance for an independent judicial system. This analysis has been divided into two thematic approaches relevant to her mandate: one relating to gender and the administration of justice[1] and the other to gender in the criminal justice system.

4. This report focuses on the importance of integrating a gender perspective in the criminal justice system. It addresses the issues of the underrepresentation of women among judicial officers and the need to create and strengthen training and capacity-building programmes on international human rights law and jurisprudence, in particular gender equality and women's rights, for all judicial actors, as an important requisite for an independent and impartial judiciary (sect. III.B).

5. While it is important to note that the meaning, scope and impact of gender encompass more than women's rights, this report of the Special Rapporteur focuses on the interlinkages of the independence of judges and lawyers and the criminal justice system when dealing with women victims, witnesses or offenders, and underlines the negative impacts of gender-based stereotypes and discrimination and the importance of integrating a strong gender perspective in all aspects of the criminal justice system (sect. III.C, D and E).

II. Activities of the Special Rapporteur

6. The activities carried out by the Special Rapporteur from 1 January 2010 to 15 March 2011 are outlined in the recent report she submitted to the Human Rights Council.[2] Since then, the Special Rapporteur has participated in various conferences and meetings, taken action in response to communications and allegations received from individuals and organizations, and pursued dialogue with Governments.

[1] The report of the Special Rapporteur on the independence of judges and lawyers of 29 April 2011 (A/HRC/17/30 and Corr.1) analyses some aspects of the multifaceted relationship between gender and the judiciary within the broader context of the administration of justice. Major obstacles to women's access to justice, including the feminization of poverty, and the lack of gender sensitivity of judicial actors, as well as laws, policies and practices that discriminate against women, were addressed therein and recommendations on the role of the judiciary in advancing women's human rights were made.

[2] A/HRC/17/30 and Corr.1.

7. On 15 April 2011, the Special Rapporteur gave a speech on "The role of the United Nations Special Rapporteur on the independence of judges and lawyers in promoting and seeking to ensure the Basic Principles on the Role of Lawyers", during the event commemorating the twenty-fifth anniversary of the organization Lawyers for Lawyers, which was held in Amsterdam.

8. On 26 and 27 May 2011, she participated in an expert meeting on "Gender and Victim and Witness Protection" organized in Geneva by the Office of the United Nations High Commissioner for Human Rights, during which she delivered a statement.

9. On 30 May 2011, the Special Rapporteur submitted her annual report to the Human Rights Council (A/HRC/17/30 and Corr.1), accompanied by an addendum on communications, an addendum on her August-September and December 2010 missions to Mozambique and an addendum on her October 2010 mission to Mexico. During the seventeenth session of the Human Rights Council, on 31 May 2011, she participated in a side-event on "The role of judges and lawyers in times of crisis", organized by the International Commission of Jurists. On 1 June 2011, she also participated in a side-event regarding the report of her mission to Mexico, organized by the Mexican Commission on the Defence and Promotion of Human Rights, the World Organization against Torture, the Geneva Office of Peace Brigades International, and the Law Society.

10. On 16 and 17 June, the Special Rapporteur attended an international conference on "Strengthening the Capacity of National Associations of Judges and the Domestic Application of the Convention for the Protection of Human Rights and Fundamental Freedoms", hosting a panel on "Challenges to the independence of the judiciary and judges", in Kiev. The conference was organized within the framework of the Second Annual Meeting of the authorized representatives of the national associations of judges of Armenia, Estonia, Georgia, Kazakhstan, Poland and Ukraine, States parties to a memorandum of understanding on multilateral cooperation, with the cooperation of the Council of Europe and the Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit e.V.

11. The Special Rapporteur participated in different interactive panels in the fourth Law in the Future Conference organized by the Hague Institute for the Internationalization of Law (HiiL) in The Hague on 23 and 24 June 2011.

12. From 27 June to 1 July 2011, she participated in the nineteenth annual meeting of Special Rapporteurs, Representatives, Independent Experts and Chairpersons of Working Groups of the Human Rights Council, organized by the Office of the United Nations High Commissioner for Human Rights in Geneva.

13. The Special Rapporteur visited Bulgaria (from 9 to 16 May 2011) and Romania (from 17 to 24 May 2011). Reports on these missions and the related recommendations will be included in addenda to the Special Rapporteur's next report to the Human Rights Council. The Special Rapporteur wishes to thank the Governments of Bulgaria and Romania for their cooperation. She also wishes to thank the Government of Turkey for the invitation extended to her to visit the country in October 2011.

14. The Special Rapporteur recalls that, since her appointment, she has requested invitations to visit or sent reminders to the following countries: Angola (2008); Argentina (2011); Azerbaijan (2009); Bangladesh (2007); Cambodia (2006); China

(2011); Cuba (1995); Egypt (1999); Equatorial Guinea (2002); Fiji (2007); Georgia (2008); India (2011); the Islamic Republic of Iran (2006); Iraq (2008); Kenya (2000); Liberia (2010); Malaysia (2011); Maldives (follow-up visit, 2011); Myanmar (2009); Nepal (2011); Nigeria (1995); Pakistan (2000); the Philippines (2006); Sri Lanka (1999); Tunisia (1997); Turkmenistan (1996); Uzbekistan (1996); Venezuela (Bolivarian Republic of) (2011); and Zimbabwe (2001).

15. The Special Rapporteur hopes that invitations from the above-mentioned countries will be received in the near future. She also wishes to thank the Governments that have responded positively to her requests for a visit.

III. Gender in the criminal justice system: the role of judges and lawyers

A. Introduction, normative framework and rationale

16. In 1994, the Commission on Human Rights called upon special rapporteurs to regularly and systematically include in their reports available information on human rights violations against women.[3] Special procedures were more recently reminded to integrate a gender perspective into the implementation of their mandate.[4] The Special Rapporteur's mandate itself entails the requested application of a gender perspective in her work.

17. The Special Rapporteur has already established and analysed the importance of combating impunity in respect of upholding the rule of law and democratic governance and the role to be played by the criminal justice system.[5] It is also well established under international human rights law that States have an obligation to investigate, prosecute and provide remedy for victims of human rights violations, including gender-based violence. Judges and lawyers have a particular responsibility for protecting and promoting both human rights and the rule of law.[6]

18. Moreover, the principles of non-discrimination on the grounds of gender, and equality between women and men, have been recognized and enshrined in numerous international and regional human rights instruments, including in the principal United Nations' human rights treaties,[7] in particular article 14 (1) of the International Covenant on Civil and Political Rights (see General Assembly resolution 2200 A (XXI), annex), which states that "All persons shall be equal before the courts and tribunals" and the Convention on the Elimination of All Forms of Discrimination against Women (United Nations, *Treaty Series*, vol. 1249, No. 20378), which

[3] Resolution 1994/45, para. 18.

[4] Human Rights Council resolution 6/30, para. 18.

[5] A/65/274.

[6] See: Draft Universal Declaration on the Independence of Justice, article 1 (b); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, principle 10 (b); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principles F (h) and I (i); Declaration of Caracas of the Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, policy 1; Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors (April 1999), articles 1 and 4.2 (b).

[7] See, for instance, A/HRC/15/40 and Human Rights Council resolution 15/23.

enshrines the minimum standards that States must uphold in order for every woman under their jurisdiction to fully enjoy her rights without discrimination.

19. In this report, "gender" means the socially constructed roles of women and men or the social differences that are learned.[8] Gender stereotypes — a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular gender group — affect both men and women, but "they often have a particularly egregious effect on women".[9] Article 5 (a) of the Committee on the Elimination of Discrimination against Women contains the obligation to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[10] Gender stereotypes are both pervasive and persistent. Understanding the role of the judiciary in shaping and contributing to gender stereotypes is an essential step for States in addressing inequality and thereby abiding by their international obligations.

20. Approaching the criminal justice system from a gender perspective involves an analysis of its impact upon women and men and ensuring that women's rights, perspectives and needs, as well as those of men, are systematically considered. Historically and globally, women have been underrepresented as actors in the criminal justice system, even if they constitute a large proportion of the victims of crimes and human rights violations and are disproportionately affected by gender-based violence and discrimination.[11] In this context, this report focuses on the treatment of women in the criminal justice system. However, the concept of gender should not be considered to encompass exclusively the situation of women.

21. When crimes and human rights violations go unpunished, the State can be held accountable for contributing to a culture of impunity and lawlessness. When certain types of crimes, such as gender-based crimes and other types of crimes that disproportionately affect one gender, go unpunished, the State can, in addition, be held accountable for discriminatory treatment under international law.

B. The case for a gender-representative and -sensitive judiciary

22. The judiciary and legal profession are not immune to gender-based discrimination. Women have been historically excluded from judicial office, as the legal profession has been considered a male domain, where appointments and promotion procedures and criteria are also often gender-biased.[12]

[8] A/HRC/12/46, para. 33.

[9] Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspective* (Philadelphia, Pennsylvania, University of Pennsylvania Press, 2010), p. 1; see, also, p. 9.

[10] See also: article 2 (2), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; article 8 (b), Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women; and article 12 (1), Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence.

[11] United Nations Office on Drugs and Crime, "Crosscutting issues: Gender in the criminal justice system assessment tool — criminal justice assessment toolkit" (Vienna, 2010), p. 1.

[12] Dermot Feenan, "Women and judging", *Feminist Legal Studies*, vol. 17, No. 1 (2009), p. 3.

1. Women's representation in the judiciary

23. Women are still largely underrepresented in judicial office and in the legal profession throughout the world, in particular in the highest-level positions; this undoubtedly reflects institutionalized gender discrimination within the justice system.[13] While worldwide quotas have caused a large increase in female representation in the legislature, States seem to have bypassed the opportunity to apply a similar gender analysis to the judicial branch. States, then, have to undertake measures to ensure that women have the same right as men to be judges, advocates or other officers of the court.[14]

24. Women appointed to office also have to face bias and discrimination from their colleagues and society at large on the basis of assumptions about their gender. Their behaviour is scrutinized and harshly criticized, their qualifications are more frequently questioned than those of their male colleagues, and their objectivity is more likely to be challenged. Women are often restricted or pushed to working on "low-profile" cases, in areas of the law that are traditionally associated with women, like family law, or confined to working in the lower courts.[15]

25. Women have also been traditionally underrepresented on international judicial bodies. Gender imbalance presents a threat to the legitimacy and authority of such international tribunals. The institutional features of the Rome Statute of the International Criminal Court strongly contributed to the fact that there are a majority of women judges currently sitting on the International Criminal Court.[16]

26. There are several rationales that exist to explain the importance of increased representation of women in the judiciary. Since a primary function of the judiciary is to promote equality and fairness, the composition of courts and other judicial

[13] Dermot Feenan, "Women judges: gendering judging, justifying diversity", *Journal of Law and Society*, vol. 35, No. 4 (2008), p. 491. See also Marcela Valente, "Justice for women in men's courts?". Available from http://ipsnews.net/print.asp?idnews=37429.

[14] Article 7 (b), Convention on the Elimination of All Forms of Discrimination against Women; Committee on the Elimination of Discrimination against Women General Recommendation No. 23, para. 5; Beijing Declaration, para. 13, and Beijing Platform for Action, paras. 190 (a), 232 (d) and 323 (m); United Nations Basic Principles on the Independence of the Judiciary, principle 10; United Nations Basic Principles on the Role of Lawyers, principle 10; United Nations Guidelines on the Role of Prosecutors, guideline 2 (a); Draft Universal Declaration on the Independence of Justice, articles 10, 77 and 80; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, article 14 (3); European Court of Human Rights, Rules of Court, rule 14; Rome Statute, article 36 (8) (a) (iii); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, para. 13; Latimer House Guidelines for the Commonwealth, principle II.1; Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities, chap. VI.45.

[15] Sally Kerney, "Critical perspectives on gender and judging", *Politics and Gender*, vol. 6, No. 3 (2010), p. 439; Feenan, "Women judges: gendering judging, justifying diversity", p. 499; Justice McLachlin, "Why we need women judges", statement, delivered at the eighth biennial conference of the International Association of Women Judges Conference, Sydney, Australia, 3-7 May 2006; and Karen O'Connor, "Judging alone: reflections on the importance of women on the court", *Politics and Gender*, vol. 6, No. 3 (2010), p. 449.

[16] Articles 36 (8) (a) (iii) and 36 (8) (b); see also: Louise Chappell, "Gender and judging at the International Criminal Court", *Politics and Gender*, vol. 6, No. 3 (2010), p. 488. Article 44 (2) states that the criteria set in article 36 (8) apply mutatis mutandis to the selection of staff in the Office of the Prosecutor and in the Registry.

offices should reflect the State's commitment to equality. The judicial system should also demonstrate a fair representation of the pluralistic society and communities they serve, by reflecting their diversity, so as to preserve and improve public trust and confidence in its credibility, legitimacy and impartiality.[17]

27. Moreover, women, like men, are informed and influenced by their backgrounds and experiences. For various reasons, whether historical, cultural, biological, social or religious, women's experiences differ from those of men, and for this reason women can bring different perspectives or approaches to adjudication, while fighting against gender stereotypes. Consequently, a diverse judiciary will ensure a more balanced and impartial perspective on matters before the courts, eliminating barriers that have prevented some judges from addressing certain issues fairly. This reasoning is equally applicable to the matter of encouraging the representation of other underrepresented "groups", like ethnic, racial or sexual minorities, among others.[18]

28. Measures and mechanisms designed to deliver change can take various forms, ranging from constitutional or legal reform to public outreach. To be effective, any set of measures requires conscious efforts on the part of all branches of the government, as well as the legal profession. The legal profession, for instance, can identify and remove hidden barriers which make it more difficult for women to excel in the traditional practice of law and therefore to be appointed to higher positions or judicial office.[19]

29. In South Africa, the constitution itself provides for greater gender representation in the judiciary.[20] The Virtue Foundation has recently launched the "Women Judges in the Pipeline Initiative", aimed at creating and increasing opportunities for women to become judges in judiciaries across the globe.[21] The International Bar Association and the International Criminal Court have launched "Calling African Women Lawyers", an information campaign devised to address the consistent underrepresentation of African women on the List of Legal Counsel of the Court.[22]

30. Decisional outcome is only one aspect of judging. Gender impact on judicial behaviour, including of peers and other legal professionals, is another area where the impact of women's representation in the courts deserves attention.

31. From a human rights perspective, women judges may play a unique and necessary role in the implementation and enforcement of laws, particularly those that provide access to justice for women and their full participation in society.[23] Women sitting on panels of judges have the potential ability to attract their male colleagues' support for issues relating to gender discrimination.

32. The strongest impact of women's participation as members of the judiciary is perhaps exerted through the role they have played — and continue to play — in shaping and interpreting both national and international law relating to gender-based

[17] See Draft Universal Declaration on the Independence of Justice, article 11 (a).
[18] See, for instance, Feenan, "Women judges: gendering judging, justifying diversity", p. 517.
[19] McLachlin, "Why we need women judges".
[20] Feenan, "Women and judging", p. 2.
[21] www.virtuefoundation.org.
[22] A/HRC/17/30 and Corr.1, para. 51.
[23] Sandra Day O'Connor and Kim Azzarelli, "Sustainable development, rule of law, and the impact of women judges", *Cornell International Law Journal*, vol. 44 (2011), pp. 4 and 6.

violence, including rape and other forms of sexual violence. The inclusion of women in the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is deemed to have been dramatic, as "every case involving rape or other forms of sexual violence has involved women".[24]

33. The presence of Justice Pillay, the only woman judge on the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, is said to have been instrumental in effecting inclusion of evidence of rape, first overlooked by the Office of the Prosecutor, and amending the indictment in the Akayesu case, which was the first to recognize rape as a form of genocide.[25] Interpretation of the law, then, is at least as important as the making of the law.

2. Gender and women's rights training and capacity-building

34. Overcoming the male-female imbalance in the judicial branch is only one aspect of its sensitization to gender equality and women's rights. Providing for gender-awareness training of judges, prosecutors, public defenders and lawyers of both sexes is equally important.[26] Having women in the judiciary does not guarantee the inclusion of a gender perspective per se, since both men and women are prone to gender-based biases, stereotypes and prejudices. Under peer pressure and the social pressure to "fit" in a patriarchal judicial system, women in the legal profession have sometimes adopted the forms of behaviour of their male colleagues, applying the same gender-based stereotypes in their judgements.

35. Yet, an important aspect of the requirement of impartiality is that "judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them".[27] Changing attitudes and eliminating stereotypes and prejudices require institutionalized and sustained efforts in the form of training programmes, continuing education and capacity-building on international human rights standards, obligations and jurisprudence, as well as national laws against discrimination which too often remain unknown or are not applied.

36. The United Nations Basic Principles on the Independence of the Judiciary, as well as various other legal standards, recognize that appropriate education is one of

[24] Julie Mertus, *Women's Participation in the International Criminal Tribunal for the Former Yugoslavia: Transitional Justice for Bosnia and Herzegovina* (Cambridge, Massachusetts, Hunt Alternative Fund, 2004), p. 13.

[25] Louise Chappell, "Gender and judging at the International Criminal Court", p. 490; Farida Banda, "Project on a mechanism to address laws that discriminate against women", study commissioned by the Office of the United Nations High Commissioner for Human Rights, Women's Rights and Gender Unit, 2008, p. 12.

[26] Marcela Valente, "Women judges not enough: gender awareness training needed", Inter Press Service News Agency (IPS). Available from http://ipsnews.net/print.asp?idnews=48519. See also: Bangalore Principles of Judicial Conduct, principle 5 (1).

[27] Human Rights Committee, General Comment No. 32, para. 21. See also: Bangalore Principles of Judicial Conduct, principle 5 (2).

the preconditions for selection for judicial office.[28] The Basic Principles on the Role of Lawyers provide that Governments must ensure that lawyers have appropriate education and training, so as to be able to advise and protect the rights of their clients and uphold the cause of justice.[29] The Committee on the Elimination of Discrimination against Women affirmed that "Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention".[30] The Rome Statute of the International Criminal Court requires that, in the selection of judges, prosecutors and other staff, the need for legal expertise on violence against women or children must be taken into account.[31]

37. The Special Rapporteur has underlined the need for continuing and effective education in international and regional human rights law for magistrates, judges, prosecutors, public defenders and lawyers, in addition to regular legal training, in a previous report to the Human Rights Council.[32] Times of legal transition, change or reform are particularly favourable occasions for instituting such programmes of judicial education.

38. As State actors, judges have an obligation and responsibility under international law to ensure that substantive rights are enjoyed without discrimination. This entails a proactive duty to ensure that they are upholding international equality and non-discrimination standards in both case deliberations and the application of court procedures. Judges can recommend the repeal or amendment of a law or rule if inconsistent with international human rights standards.[33]

39. In the words of Justice Majida Razvi, one of Pakistan's first female High Court judges, "Judges always have the discretionary power to ensure that justice is done by rendering judgements that are fair. They can use this space while remaining within the parameters provided by the laws."[34] Key to this process is the willingness of the judiciary to recognize the opportunities for interpreting laws and principles in ways that make equality possible.

40. International human rights treaties and standards, as well as the jurisprudence arising from judicial and quasi-judicial bodies, provide judges with legitimate instruments for adjudication that respects equality and non-discrimination principles. For instance, in the case of *R* v. *Ewanchuck*, the Supreme Court of Canada drew on the Committee on the Elimination of Discrimination against Women and its general recommendation No. 19 to decide, in a case of assault, that violence against women is a matter of inequality and violation of human rights and that stereotypical assumptions had created the myth that women are sexually

[28] See for instance: Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, A (4) (i) and (k); Recommendation No. R (94)12, Committee of Ministers of the Council of Europe, principle III (1); Statute of the Iberoamerican Judge, article 24.

[29] Principle 9.

[30] General Recommendation No. 19, para. 24 (b). See also: Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 65/228, annex), para. 20 (a).

[31] Articles 44 (2) and 36 (8).

[32] A/HRC/14/26; see also A/HRC/11/41, paras. 80-84; and A/64/181, paras. 28-30.

[33] A/HRC/14/26, para. 70.

[34] Cassandra Balchin, "Sitting in judgement: for men only?", 2 August 2010 Open Democracy. Available from www.opendemocracy.net.

available if dressed in a certain way or until they resist".[35] In *State* v. *Godfrey Baloyi*, the Constitutional Court of South Africa also used the Convention to uphold the constitutional validity of legislation that reversed the burden of proof in allegations of breaches of interdicts in cases of domestic violence against women.[36]

C. Participation of women victims in the criminal justice system

41. Gender discrimination against women, if particularly blatant in cases of gender-based violence, is also a concern in respect of non-gendered crimes experienced by women.

42. The lack of criminalization at the national level of certain kinds of gender-based harm, such as domestic violence, marital rape and sexual harassment, which disproportionately affect women, has a detrimental impact on women's access to and participation in criminal justice proceedings. As seen above, even if judges do not make the laws, they have a duty and responsibility to uphold equality and non-discrimination standards, whether national or international, with a view to pointing towards the gaps in legislation.[37] Additionally, when legal systems do not specifically criminalize particular gender-based forms of abuse, harmful forms of conduct should be investigated, prosecuted and sentenced under existing general laws, including equality provisions found in the constitution of the State.

43. A number of laws directly or indirectly bar or limit women from accessing the criminal justice system. These include laws that restrict women's freedom of movement, and laws on "male guardianship" which keep women in the legal status of minors, thereby denying women a legal capacity equal to that of men and the opportunity to exercise that capacity, which is contrary to article 15 of the Convention on the Elimination of All Forms of Discrimination against Women.[38] Such laws also limit women's access to and engagement with the criminal justice system.

44. Women whose rights have been violated possess the right to access remedy, including by participating in criminal proceedings. While the legal process must conform to international fair trial standards, court procedures and rules of evidence should ensure that women are not at a disadvantage with respect to participating.[39] There is a strong emerging trend in international law that recognizes the legal status and rights of victims of gross human rights violations, criminal offences and crimes

[35] United Nations High Commissioner for Human Rights, statement, tenth biennial International Association of Women Judges Conference, Seoul, 2010, p. 16.

[36] Ibid., p. 17.

[37] A/HRC/17/30 and Corr.1, paras. 27-36; see also: Fareda Banda, "Project on a mechanism to address laws that discriminate against women".

[38] Human Rights Watch, *Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia* (New York, 2008), p. 24.

[39] Medical Foundation for the Care of Victims of Torture, "Justice denied: The experiences of 100 torture surviving women of seeking justice and rehabilitation" (2009), p. 19.

against international law.[40] Several international bodies have paid particular attention to the role of victims in criminal proceedings.[41]

45. The Rome Statute of the International Criminal Court allows victims to participate directly or through legal representatives in proceedings before the Court, by presenting their views and concerns at all stages that affect their personal interests.[42] Regional standards, too, reflect the importance of human rights victims' participation in judicial proceedings.[43]

46. Procedures and rules of evidence in the criminal justice system are often infiltrated by strong gender stereotypes which can result in engagement in gender-biased behaviour by court officials and discrimination against women by the criminal system in general. Gender stereotypes particularly affect procedures in rape and violence against women cases.[44]

47. In many States, provisions on rape and sexual assault in criminal codes are based on gender stereotypes and prejudices which result in the discriminatory treatment of victims, who are disproportionately female. Hence, high levels of attrition plague the prosecution of rape and sexual violence cases throughout the world, resulting in a significant problem of impunity.[45]

48. Examples of stereotypes applied to rape cases through gender-biased criminal rules of evidence and procedure are provided by cases where the following requirements or beliefs obtain: proof of physical violence is required to show that there was no consent; women are likely to lie, therefore evidence should be accepted only if corroborated; women can be assumed to be sexually available; women can be inferred to be consenting to sex even if forced, threatened or coerced, because they remained silent; previous sexual experience predisposes women to be sexually available, or to automatically consent to sex; women bear the responsibility for sexual attacks or invite them by being out late or in isolated places or by dressing in

[40] International Commission of Jurists, *Trial Observation Manual for Criminal Proceedings*, Practitioners Guide, No. 5 (Geneva, 2009), p. 147.

[41] For instance: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 52/86, annex), para. 7; Optional Protocol to the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography, article 8; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex); Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (E/CN.4/2005/102/Add.1), principle 19, para. 2; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, article 6.

[42] Article 68 (3); and Rules of Procedure and Evidence of the International Criminal Court, rules 85 and 89-93.

[43] Committee of Ministers of the Council of Europe, Recommendation (85)11 E on the Position of the victim in the framework of criminal law and procedures; Guidelines on the Protection of Victims of Terrorist Acts, Committee of Ministers of the Council of Europe (2 March 2005); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; and Framework decision of 15 March 2001 on the standing of victims in criminal proceedings, Council of the European Union.

[44] Lisa Gormley, "Gender stereotyping in cases of rape and violence against women: developments in human rights jurisprudence", *INTERIGHTS Bulletin*, vol. 16, No. 3 (2011), p. 140.

[45] Ibid.

a particular manner; it is impossible to rape a sex worker; raped women have been dishonoured or shamed or are guilty rather than victimized.[46]

49. In the context of domestic violence, the Human Rights Committee expressed concerns about the inclusion in law provisions of stereotypical language to describe the behaviour of victims of domestic violence.[47]

50. Progressive measures were adopted in the rules of procedure and evidence of the International Tribunals for the former Yugoslavia and Rwanda and, later, in those of the International Criminal Court: impossible evidentiary burdens should not be imposed on the victim; no corroboration of the victim's testimony shall be required; sexual availability should not be presupposed; the use of evidence relating to the prior sexual conduct of the victim is not allowed; silence cannot be assumed to indicate consent; and the credibility of the victim cannot be called into question simply on the basis of her gender.[48]

51. For women's participation in the criminal justice system to be effective and non-discriminatory, their counsel, as well as the prosecutors, also need to be aware of gender equality and women's rights issues. However, because of biased assumptions regarding their gender or the crimes they have been victims of, women too often have to endure lack of action from the prosecution, discriminatory attitudes by prosecutors, judges and other court officials, including defence counsel, and poor advice from their own counsel — all of which can result in their secondary victimization or re-victimization and the non-enforcement of their rights. Research has shown that the psychological impact of victimization can be considerably exacerbated by such insensitive treatment and lack of understanding of victims' needs.[49] Women are not the only ones facing secondary victimization: children, persons with disabilities, and male victims of rape, constitute particularly vulnerable categories of victims.

52. Representation of women within the ranks of prosecutors, and their adequate training on gender equality and women's rights, are important for the proper functioning of a gender-sensitive criminal justice system. Prosecutors are entrusted with a number of functions which they must carry out in an impartial and objective manner while avoiding gender-based or any other kind of discrimination.[50] This implies that prosecutors shall be free from any bias when carrying out their professional duties. In the Rome Statute, the prosecutor is charged with investigating and prosecuting crimes in a way that "respect(s) the interests and personal circumstances of victims and witnesses, including … gender". He or she is also required to "take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children".[51]

53. The jurisprudence of international and regional bodies has addressed the issue of biases and inaction of the criminal justice system and has held States accountable.

[46] Ibid.

[47] Concluding observations of the Human Rights Committee, on Ukraine (CCPR/C/UKR/CO/6), 28 November 2006, para. 10.

[48] Rule 96; Rome Statute, article 69(4); Rules of Procedure and Evidence of the International Criminal Court, rules 63 and 70-72.

[49] Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice* (Oxford, Hart Publications, 2008), p. 51.

[50] United Nations Guidelines on the Role of Prosecutors, guideline 13, para. (a).

[51] Article 54 (1) (b).

In *AT* v. *Hungary*, the Committee on the Elimination of Discrimination against Women found a systemic deficiency in the State's legal responses to domestic violence in the form of lengthy and unwieldy criminal proceedings. The Committee confirmed that the inaction of the State was a breach of international law. In *Vertido* v. *Philippines*, the Committee dealt with how the investigation and prosecution of a rape case in the Philippines had contravened legal obligations under the Convention. The Committee explicitly identified stereotyping as affecting women's right to a fair and just trial and stressed that "the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general".[52]

54. In the inter-American human rights system, the so-called Cotton Field case illustrated the pernicious effects of stereotyping of women victims of sexual violence and how it undermines the proper functioning of the criminal justice.[53] The Inter-American Court of Human Rights also found that stereotyping of victims of violence by police, investigators and prosecutors constituted a breach of the right of the victims' families not to be subjected to torture and ill-treatment.[54] In two recent cases that concerned the rape of two poor indigenous women by members of the military, the Court found Mexico to be in breach of its international obligations because the victims were met with hostility and experienced negligence in the investigations, little medical response and no support services by the Government, including judicial authorities; moreover, threats against them and their families had not been properly addressed, which led to an overall obstruction of justice.[55]

55. The European Court of Human Rights challenged stereotypes about "date rape" in *MC* v. *Bulgaria*.[56] The Court also upheld the positive duty of States to ensure the effectiveness of the criminal law system through effective investigation and prosecution. In *Opuz* v. *Turkey*, the Court condemned, inter alia, the discrimination manifested in the general attitude of the local authorities, and the judicial passivity in responding to the victims' complaint and providing them with effective protection, as being conducive to domestic violence.[57]

56. Prosecution of gender-based crimes should be based not on the individual commitment of the prosecutor but rather on an institutional policy. This requires integration of a gender perspective in the criminal justice system as well as, in particular, institutionalized and sustained trainings of prosecutors.

57. In the opinion of the Secretary-General, "(s)pecialized courts can improve efficiency, minimize the burden on victims and improve case outcomes when prosecutors, judges and other court officers have received relevant training".[58] Such courts seem to reduce the turnaround time and attrition of cases and to increase

[52] CEDAW/C/46/D/18/2008, para. 8.4; see also: Gormley "Gender stereotyping", pp. 143-144.

[53] *Gonzales et al.* v. *Mexico*, 2010; see also: Gormley, "Gender stereotyping", p. 142.

[54] Gormley, "Gender stereotyping", p. 143.

[55] *Fernández-Ortega et al.* v. *Mexico*, 2010; and *Rosendo-Cantú et al.* v. *Mexico*, 2010.

[56] *M.C.* v. *Bulgaria*, 2003, paras. 177 and 185.

[57] Paras. 119-123, 168-170 and 198; see also: Bonita Meyersfeld, "Developments in international law and domestic violence", *INTERIGHTS Bulletin*, Vol. 16, No. 3 (2011), pp. 110 and 113.

[58] Report of the Secretary-General entitled "In-depth study on all forms of violence against women" (A/61/122/Add.1 and Corr.1), para. 315.

conviction rates. Specialized courts, like mobile and domestic violence courts, can improve the functioning of justice for women and allow judges and judicial personnel to increase their expertise.[59] While international law does not preclude the existence of specialist jurisdictions for certain parties in criminal matters in strictly defined situations, it is imperative that such tribunals conform to all international provisions for fair trial.[60]

58. While supporting the creation of specialized criminal courts to deal specifically with gender-based crimes, the Special Rapporteur wishes to highlight that the key to these courts' working efficiently to preserve victims' rights is a very well-designed and organized structure capable of providing comprehensive legal, social and psychological support to victims, especially when they need to leave their home and/or family temporarily. Specialized units created within courts can also have a very positive impact on protecting women's rights.

59. Setting up specialized courts as a temporary special measure for redressing a situation of marked unequal access to the criminal justice system could prove useful. The Special Rapporteur wishes to underline that it is important that decisions to create specialized courts or units, reinforce gender training or reform procedures in the criminal justice system be based on an appropriate and thorough gender analysis of the functioning of the criminal justice system and accompanied by monitoring and evaluation systems to ensure that the impact is effective.

D. Protection of women victims and witnesses and their families in the criminal justice system

60. Participation in criminal proceedings often carries a level of risk for any witness. The challenge facing criminal justice systems is to be able to adjust the level of risk-relating to the specificities of individual cases. Successful witness and victim protection is at the core of any efficient investigation and prosecution of perpetrators of gross violations of human rights and serious violations of international humanitarian law, including sexual and gender-based violence and particular crimes such as human trafficking. The provision of a witness and victim protection framework helps to create an enabling environment for the reporting of cases by witnesses and victims, and encourages them to cooperate in subsequent proceedings. Several holders of special procedures mandates have noted that "effective witness protection efforts are often lacking despite their relevance to the protection from human rights violations, such as extrajudicial executions, torture, human trafficking, disappearances and violence against women".[61]

61. Judges, prosecutors and lawyers have a role to play in requesting and enforcing protection measures, and deciding or recommending which measures should be applied in which circumstances. They should therefore be aware of the

[59] UN-Women, *Progress of the World's Women 2011-2012: In Pursuit of Justice* (New York, 2011), pp. 58-59.

[60] International Commission of Jurists, "International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors", Practitioners Guide, No. 1 (Geneva, 2007), pp. 8-9.

[61] Joint statement on "The role of witness protection in ending the cycle of impunity for human rights violations", 30 September 2009.

protection mechanisms available nationally and should be sensitized to the gender dimensions of protection.

62. Witness protection is not a favour granted to the witness but a duty of States under international law. Key international and regional human rights instruments make clear reference to States' obligations to adopt specific measures designed to protect witnesses and victims from threats and reprisals.[62] The recent Council of Europe Convention on preventing and combating violence against women and domestic violence has a specific provision on risk assessment and risk management (article 51). The practice of international tribunals has reinforced the standards, norms and principles found in these instruments.[63]

63. Article 54 (1) (b) of the Rome Statute requires the prosecutor of the International Criminal Court to "take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court and, in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children". The measures taken by the Court must "not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[64] While the international courts have a unique and specific character, the operating principles in relation to protection and support of witnesses are of such a generic nature that any jurisdiction could benefit from considering the experiences and the practices developed for application at the national level.

64. Protection measures and programmes for victims and witnesses should be routinely evaluated for effectiveness. At a minimum, two sets of protection measures are necessary to enable witnesses and victims to come forward safely for the purpose of collaborating with the criminal justice system: (a) measures and procedures put in place by the judicial authorities while investigating crimes or taking testimony in the courtroom; (b) protection measures and safeguards provided, when necessary, before, during and after judicial proceedings by formal witness protection programmes.[65]

65. Procedural measures of protection are measures granted by a judge or the judicial authority. During trial, such measures may include, inter alia: excluding the

[62] These include: International Covenant on Civil and Political Rights, articles 2 (1), 10 and 17; Convention on the Elimination of All Forms of Discrimination against Women, articles 2 and 6; Convention against Torture and Other Cruel, Inhuman of Degrading Treatment or Punishment, article 13; International Convention for the Protection of All Persons from Enforced Disappearance, article 12 (4); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, article 8 (1) (a); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 6 (d); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 3 (b); Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 10; and Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. III (5).

[63] A/HRC/15/33, para. 12.

[64] Article 68 (1); see also: Rules of Procedure and Evidence of the International Criminal Court, rules 87-88.

[65] A/HRC/15/33, para. 4.

public from the court for part of or the entirety of a trial; use of a pseudonym; face or voice distortion; use of screens to shield the witness; testimony by video-link, testimony without the presence of the defendant or a closed court session; prohibition of the publication or dissemination of information that might reveal the identity of a victim or witness; appointing a counsel to conduct cross-cutting examination when the accused is acting as his or her own counsel; or allowing victims under age 18 to testify in the presence of a support person.[66]

66. While testifying in a criminal trial is a stressful experience for any witness, some are more vulnerable than others to such stress and may require special support measures designed to protect and enhance the quality of their testimony. In addition, needs may differ according to gender and the nature of the crime under consideration, which is especially relevant when the witness is also a victim. Court procedures may be adjusted to the particular capacity and needs of witnesses, which should be previously assessed in relation to their personal situation and the circumstances of their case. Such support or assistance measures can involve adjusting questioning so as to eliminate unnecessary, intrusive, repetitive or embarrassing questions; allowing for frequent breaks during the testimony; altering the courtroom settings to make them less formal; and having a support person who is present in the court or event, sit next to the witness.

67. Formal witness protection programmes are designed to grant a full range of physical protection and psychological support to beneficiaries before, during and after judicial proceedings. Protection programmes, as well as specific measures, should take into account particular needs of women and the particular risks and threats that they face.[67]

68. At the International Criminal Court, special measures may be ordered to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence. The Victims and Witnesses Unit located within the Registry can provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims and others at risk on account of testimony given by witnesses.

69. Special action taken with a view to ensuring gender-sensitive protection of women should be presented in the context of providing equal protection of and access to the law, so that judges and other authorities involved in deciding such measures are seen not as performing something "special" for women, which may undermine the accused's right to fair trial, but rather as ensuring that what exists for others also exists for women.

70. The Special Rapporteur wishes to underline in the context of protection measures the serious issue of "protective detention" or "safe custody". Under safe custody, victims of domestic violence, rape and marriages of convenience, inter alia, are detained in a jail or shelter as a mechanism of protection. Imprisoning victims and/or witnesses is unjust, puts them at great risk of further custodial violence and/or keeps them confined against their will. It also often deprives them of access to their children or family and necessary medical and psychological services. Provisions of safe custody are usually gender-neutral; however, in practice, they have a disproportionate impact on women, girls and those in poverty. Placing

[66] Ibid., para. 23.

[67] Ibid., paras. 25-38.

victims in protective custody is an extreme measure which should constitute a last resort and one applied with the consent of the victim, and with all appropriate legal safeguards for the review of the detention.[68]

71. The Special Rapporteur wishes to highlight further the importance of women's agency, which, in the context of witness protection, means that they need to be fully informed and empowered to make decisions about what may affect them and whether to testify or not.[69] Women are not intrinsically vulnerable: it is their particular individual situation, coupled with pervasive societal gender-based discrimination, that facilitates their being threatened and targeted by violence. Specific groups of women, like victims of trafficking, sexual violence, domestic violence and so-called honour crimes and women under age 18, may be found to be especially vulnerable to further violence. Women should not be overprotected simply because of their gender; indeed, with the appropriate safeguards, the experience of witnessing can be empowering for women and crucial for advancing the goals of the criminal justice system. An overprotective attitude can also be the result of judges', prosecutors' and/or lawyers' uncomfortable position when confronted with witnesses' emotions or stories that include details of sexual acts.

72. During her country visits, the Special Rapporteur has received numerous testimonies of women victims of sexual exploitation and trafficking who are fearful because they are dealt with by the same Ministry that is responsible for fighting crimes, usually the Ministry of the Interior, and kept in the same physical location as offenders, who have the opportunity to further intimidate and threaten them. This situation discourages them from filing a complaint denouncing their offenders, thereby impeding their access to justice. In other situations, women victims of trafficking or enforced prostitution stated feeling very discouraged by the justice system because the courts had deprived them of the custody of their children. The Special Rapporteur considers that women victims of such crimes should be put under the protection of a different Ministry, such as the Ministry of Social Welfare, in order that they may avoid situations of re-victimization.

73. The Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice[70] can serve as guidance in formulating a gender- and rights-based approach to victim and witness programming. The Special Rapporteur also wishes to commend the Office of the United Nations High Commissioner for Human Rights initiative aimed at development of a practical tool on gender and witness and victim protection for the implementation of gender-sensitive protection measures at the national level.

E. Women offenders in the criminal justice system

74. Women in conflict with the law and brought before the criminal justice system should benefit from all provisions associated with the right to a fair trial and equality before the courts without discrimination based on their gender, or any other grounds of discrimination prohibited under international law. The Special

[68] See for instance: United Nations Office on Drugs and Crime, "Cross-cutting issues: gender in the criminal justice system assessment tool", p. 34.

[69] Mertus, *Women's Participation in the International Criminal Tribunal for the Former Yugoslavia*, pp. 16-17.

[70] General Assembly resolution 65/228, annex.

Rapporteur is highly concerned both by provisions of criminal law that are discriminatory to women and by the discriminatory application of provisions against them during criminal proceedings. Such discriminatory provisions include, but are not limited to, the criminalization of adultery or fornication, punishing illegal entry and prostitution of victims of trafficking, punishing girls for sexual intercourse with relatives in cases of incest, and criminalization of abortion, including in cases of miscarriages or threat to the life and health of the mother. The Special Rapporteur wishes to recall that by upholding discriminatory laws, judges and prosecutors become parties to the violation of the State's international obligations.

75. Women accused of crimes have the right to a fair public hearing by a competent, independent and impartial tribunal, which, in the opinion of the Special Rapporteur, and as detailed in section III.B of this report, requires that judges, prosecutors and lawyers be sensitized to and trained on gender issues and international human rights of women, including principles of equality and non-discrimination. Judges must be in a position to challenge gender stereotyping and discrimination when they encounter it in the form of wrongful charging of suspects, charges being brought without any supporting evidence of wrongdoing and merely on the basis of hearsay, or mis-charging of a particular form of conduct (like charging abortion as infanticide). Judges must also be willing to challenge stereotyping and discrimination by not detracting from women's testimony or discounting their credibility, which applies whether women are the accused or victims.

76. Judges should also be aware that the presence of mitigating circumstances in gender-specific situations can be introduced in judging women offenders. For instance, the Inter-American Commission on Human Rights was of the opinion that the national court of Trinidad and Tobago, which had sentenced a woman to death, for the murder of her husband, should have taken into account evidence of years of severe violence against the offender. The offender's sentence was ultimately reduced to 13 years on the basis of psychiatric evidence, which showed that, at the time of the murder, she had been suffering from "battered woman syndrome".[71]

77. Challenging gender stereotyping further means challenging common assumptions: about male perpetrators — such as, for instance, their entitlement to control women in various ways and their supposed inability to control their own sexual urges; about male victims, for example, their ability, in cases of male rape, to have defended themselves; and about women as perpetrators of crimes of violence against men. Similar sensitivity is required when dealing with gender norms and expectations regarding lesbian, gay, bisexual and — particularly — transgender victims and perpetrators.

78. Access to legal assistance can also be of particular concern for women offenders. The Human Rights Committee pointed out that "[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way".[72] Furthermore, the Committee noted that "imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1".[73] The feminization of poverty observed by the Special

[71] *Indrivani Pamela Ramjattan* v. *Trinidad and Tobago*; see also: Bonita Meyersfeld, "Developments in international law and domestic violence", p. 108.

[72] General Comment No. 32 (CCPR/C/GC/32), para. 10.

[73] Ibid., para. 11.

Rapporteur in her report to the Human Rights Council[74] too often precludes women from having access to proper legal representation.

79. The condemnation of, and imposition of certain sentences on, women are also of great concern to the Special Rapporteur. Women, like men, have the right not to be punished other than in accordance with international standards, which means that torture and other cruel, inhuman or degrading treatment or punishment are absolutely prohibited.[75] This means that public executions, stoning and corporal punishment (including physical punishment involving caning, flogging, whipping, mutilation and amputation) are prohibited under international law. Yet, the Special Rapporteur notes that such sentences are still ordered and applied and disproportionately target women.

80. The vast majority of prisoners worldwide are men, resulting in detention systems' being designed for them and an overlooking of the special needs of women.[76] While conditions of detention may not be discriminatory as such, not taking into account the special needs of women in a system primarily designed for men results in detentions having a discriminatory impact on women. For instance, problems such as overcrowding, poor hygiene standards and inadequate visiting facilities do affect both men and women detainees, but women are especially vulnerable to poor hygiene conditions during menstruation. Moreover, women are often the sole or primary caregivers of young children; hence, concerns for their child's welfare in their absence create worry and anguish. Pregnant or breastfeeding women have particular problems related to their condition and should not be imprisoned except under exceptional circumstances.

81. Women are especially vulnerable to abuse from both staff and prisoners (when accommodated in the annex of a prison for male prisoners), especially to physical and sexual violence. Rape and other forms of sexual violence in detention settings, whether perpetrated by officials or co-prisoners with the acquiescence of officials, constitute torture.[77] In this context, the Special Rapporteur wishes to stress the plight and extreme vulnerability of transgender male-to-female persons who, in most circumstances, will be imprisoned in male detention facilities, even though they identify with the female gender, and recommends that States consider taking appropriate measures to avert further victimization of transgender persons in detention, as well as lesbian and gay prisoners.

82. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)[78] constitute a comprehensive instrument for guiding States' policies on the issue and ensuring that the principle of non-discrimination, as embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners, is implemented in practice. Providing for such needs in order to achieve substantial gender equality shall not be regarded as discriminatory.

[74] See A/HRC/17/30 and Corr.1, paras. 20-26.

[75] Human Rights Committee, General Comment No. 20, paras. 2-3.

[76] United Nations Office on Drugs and Crime, "Cross-cutting issues: gender in the criminal justice system assessment tool", p. 31.

[77] See A/HRC/7/3.

[78] See General Assembly resolution 65/229.

IV. Conclusions

83. Pervasiveness and persistence of gender stereotypes continue, leading to discriminatory treatment of women in the criminal justice system. Judicial officers are not immune to such stereotypes. There is a strong need for studies designed to examine the integration, or lack thereof, of gender and women's perspectives into judging, judicial procedures and the judicial branch at large. Traditional notions of judging and judicial authority must be challenged and the representation of women in the judiciary encouraged. At the same time, men, also, have the opportunity to play a crucial role, whether as judges, prosecutors or lawyers, in making the criminal justice system more accessible to women, and therefore more equal.

84. Although the focus of this report is the criminal justice system, the Special Rapporteur wishes to underline that considerations of gender are also crucial in the context of the role of judges, prosecutors and lawyers in non-criminal law settings, such as those involving family, inheritance, property and land ownership, or in personal status law and jurisprudence.

85. The intersections between gender-based discrimination and other grounds for discrimination, and the consequences thereof, are too often overlooked.[79] Intersectional or multiple discriminations compound the challenge of ensuring women's equal representation in the judiciary and the legal profession, as well as their access to the criminal justice system.

86. The Special Rapporteur wishes to welcome the recent report of UN-Women entitled *Progress of the World's Women: In Pursuit of Justice*. The report bleakly acknowledges the fact that the infrastructures of justice (police, courts and the judiciary) are all failing women. The justice system, which reflects power balances, can be more effective in protecting women's rights.

87. Comprehensive reform, changes, policies and programmes need to be designed, implemented and monitored in all branches of the State to make justice work for women. The role of judges, prosecutors and lawyers is crucial. A gender perspective must inform their independence and impartiality. The integration of a gender perspective and the rights of women in the criminal justice system is one component of the solution needed to ensure that women are not ruled out of the rule of law.

88. Specialized attention for women in the justice system must begin from the moment they enter a police station to report a violation of their rights. Efficient and effective functioning of the system should encourage victims to readily report violent acts against them to the authorities and trust that the system will protect them effectively and provide them with remedy and redress.

V. Recommendations

89. **The following recommendations of the Special Rapporteur should be read in conjunction with the recommendations that she made in her last report to the Human Rights Council.**

[79] See, for instance, A/HRC/17/26.

General recommendations

90. **The Special Rapporteur encourages States to identify and share best practices and common standards in relation to the integration of a gender perspective and women's rights in all aspects of the criminal justice system.**

91. **States should conduct a mapping exercise focusing on their crim ial justice system so as to identify the occurrences and causes of gender-based discrimination and assess their impact on all aspects of women's involvement with and participation in the criminal justice system, whether as judicial actors, victims, witnesses or offenders.**

92. **States should encourage qualified women to occupy high-level positions within the judiciary and in the justice system in general, including by setting up temporary special measures.**

93. **States should take all measures available to combat gender-based stereotyping, bias and prejudices in all aspects of the criminal justice system, including investigation, prosecution, interrogation and protection of victims and witnesses, and sentencing, including by training judicial actors.**

Training and capacity-building

94. **Institutionalized training on gender equality and women's rights, including national, regional and international human rights law and jurisprudence, should be established by States and be made compulsory for judges, prosecutors, lawyers, public defenders and other judicial actors in the justice system, in particular the criminal justice system, so as to ensure consistent application of a gender perspective.**

95. **International human rights law, in particular regarding gender equality and women's rights, should be included in the curricula of all law faculties and law schools, and in the curricula of schools for the judiciary and the academic programmes of bar associations.**

96. **Gender expertise must be promoted, valued and integrated in all types of legal training and capacity-building for the judiciary and members of the legal profession.**

Women victims' participation in the criminal justice system

97. **States should establish specialized courts or units within courts or prosecutorial offices to deal with specific gender-based crimes so as to reduce women's challenges in and barriers to accessing justice. Such courts should be staffed with gender-sensitive judicial actors, highly trained on gender equality, non-discrimination and specific gender-based crimes.**

98. **The Special Rapporteur urges States to create mechanisms or bodies to record, monitor, assess and make available, court decisions that deal with women victims and/or gender-based crimes.**

99. **States should address the issue of legal costs and lack of legal aid programmes and its disproportionate impact on women's access to the criminal justice system, as well as on the access of specifically vulnerable groups.**

Witness and victim protection

100. **The Special Rapporteur urges States to consider developing effective and efficient formal witness protection measures and programmes that are consistent with the principles of the right to a fair trial and include a strong gender perspective. Such measures and programmes should form an integral part of the criminal justice sector strategy, should be comprehensive and should cover all types of crimes, including gender-based crimes and human rights violations. States should devote the required adequate financial resources to these measures and programmes.**

101. **Threats and risks should be adequately assessed by an independent authority and the subsequent protection of victims and witnesses should be tailored to their needs and should be available at all stages of trial, including the pretrial investigation phase.**

Women offenders

102. **The Special Rapporteur recommends that States adopt criminal law provisions that do not directly or indirectly discriminate on the grounds of gender during criminal proceedings. Sentencing should include a gender perspective and inhuman sentencing should be eliminated imperatively. The specific needs of women and transgender persons should be taken into account when sentences of detention are ordered.**

Role of associations in the legal profession

103. **Bar associations and associations of magistrates, whether national, regional or international, have a crucial role to play in the effective support of women's representation in the legal profession, and in the development of effective training for judges and lawyers on international human rights law standards. They should also support and encourage the sharing of best practices in applying gender-equality norms in criminal court procedures and jurisprudence.**

International community

104. **The international community should also offer constructive substantive and technical support to Member States for ensuring women's equal representation in the judiciary, as well as their equal participation, protection and treatment, whether as victims, witnesses or offenders, in the criminal justice system, including, for example, by helping to raise the issue of appointment and promotion of women judges through the domestic political processes as an essential requirement of women's right to equal participation in public life, working with women who are in the legal profession, and sharing good practices and decisions upholding the international standard of equality and non-discrimination.**